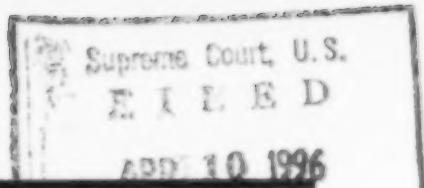


(3) No. 95-1081



In the Supreme Court of the United States

OCTOBER TERM, 1995

INGALLS SHIPBUILDING, INC., ET AL.,  
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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## **QUESTIONS PRESENTED**

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" to obtain an employer's prior written approval of certain settlements with a third party who may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive.
2. Whether the Director of the Office of Workers' Compensation Programs has standing to participate in the court of appeals as a party respondent when an employer seeks review of a Benefits Review Board decision affirming an award of LHWCA benefits.
3. Whether Section 33(f) of the LHWCA, 33 U.S.C. 933(f), which allows an employer to offset against its liability to a person entitled to compensation under the LHWCA the net recovery received by that person in a suit against third parties, also allows an employer to offset recoveries by persons who are not entitled to compensation under the LHWCA.
4. Whether the language of three settlement agreements entered into by respondent Yates and third parties contractually obligates respondent Yates to allow petitioner to offset against its liability to her under the LHWCA the settlement amounts paid to other surviving relatives who are not entitled to compensation under the LHWCA.

(I)

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Discussion .....	9
Conclusion .....	18

## TABLE OF AUTHORITIES

### Cases:

<i>Cretan v. Bethlehem Steel Corp.</i> , 1 F.3d 843 (9th Cir. 1993), cert. denied, 114 S. Ct. 2705 (1994) .....	7-8, 10
<i>Curtis v. Schlumberger Offshore Serv., Inc.</i> , 849 F.2d 805 (3d Cir. 1988) .....	13, 16
<i>Director, OWCP v. General Dynamics Corp.</i> , 982 F.2d 790 (2d Cir. 1992) .....	15
<i>Director, OWCP v. Newport News Shipbuilding &amp; Dry Dock Co. (Harcum)</i> , 115 S. Ct. 1278 (1995) .....	13
<i>Director, OWCP v. Perini North River Assocs.</i> , 459 U.S. 297 (1983) .....	13
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992) .....	6, 7, 10, 11, 12, 15
<i>Force v. Director, OWCP</i> , 938 F.2d 981 (9th Cir. 1991) .....	17
<i>Goldsmith v. Director, OWCP</i> , 838 F.2d 1079 (9th Cir. 1988) .....	16
<i>Hill v. Arrien</i> , 336 F. Supp. 799 (E.D. Pa. 1972), aff'd mem., 474 F.2d 1339, vacated in part, 475 F.2d 1395 (3d Cir. 1973) .....	17
<i>Holley v. The Manfred Stansfield</i> , 186 F. Supp. 805 (E.D. Va. 1960) .....	17
<i>Ingalls Shipbuilding Div. v. White</i> , 681 F.2d 275 (5th Cir. 1982) .....	14-15
<i>Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants</i> , 17 F.3d 130 (5th Cir. 1994) .....	12

## Cases—Continued:

	Page
<i>Insurance Co. of North America v. Gee</i> , 702 F.2d 411 (2d Cir. 1983) .....	16
<i>I.T.O. Corp. v. Pettus</i> , 73 F.3d 523 (4th Cir. 1996) .....	14
<i>I.T.O. Corp. v. Sellman</i> , 967 F.2d 971 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993) .....	17
<i>I.T.O. Corp. of Baltimore v. Benefits Review Board</i> : 542 F.2d 903 (4th Cir. 1976), vacated and remanded, 433 U.S. 904, cert. denied, 433 U.S. 908 (1977) ..	13
563 F.2d 646 (4th Cir. 1977) .....	12-13
<i>Kalaris v. Donovan</i> , 697 F.2d 376 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983) .....	15
<i>Newpark Shipbuilding &amp; Repair, Inc. v. Roundtree</i> , 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984) .....	15
<i>Newport News Shipbuilding &amp; Dry Dock Co. v. Howard</i> , 904 F.2d 206 (4th Cir. 1990) .....	15
<i>Parker v. Director, OWCP</i> , 75 F.3d 929 (4th Cir. 1996) .....	14
<i>Shahady v. Atlas Tile &amp; Marble Co.</i> , 673 F.2d 479 (D.C. Cir. 1982) .....	16
<i>Sidwell v. Express Container Servs., Inc.</i> , 71 F.3d 1134 (4th Cir. 1995) .....	14
<i>Simpson v. Director, OWCP</i> , 681 F.2d 81 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983) .....	16
<i>St. John Stevedoring Co. v. Wilfred</i> , 818 F.2d 397 (5th Cir.), cert. denied, 484 U.S. 976 (1987) .....	18
<i>Thornton v. Brown &amp; Root, Inc.</i> , 707 F.2d 149 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984) ...	15
<i>United States Dep't of Labor v. Triplett</i> , 494 U.S. 715 (1990) .....	13

## Statutes, regulations and rule:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 <i>et seq.</i> .....	9
§ 2(14), 33 U.S.C. 902(14) .....	4

## Statutes, regulations and rule—Continued:

	Page
§ 2(16), 33 U.S.C. 902(16) .....	11
§ 7, 33 U.S.C. 907 .....	2
§ 8, 33 U.S.C. 908 .....	2, 3
§ 8(i), 33 U.S.C. 908(i) .....	3
§ 9, 33 U.S.C. 909 .....	2, 4, 5, 11
§ 9(a), 33 U.S.C. 909(a) .....	6
§ 9(b), 33 U.S.C. 909(b) .....	4
§ 15(b), 33 U.S.C. 915(b) .....	8, 18
§ 16, 33 U.S.C. 916 .....	18
§ 21(c), 33 U.S.C. 921(c) .....	13, 15, 16
§ 33(a), 33 U.S.C. 933(a) .....	2
§ 33(f), 33 U.S.C. 933(f) .....	2, 6, 8, 9, 16
§ 33(g), 33 U.S.C. 933(g) .....	2, 5, 9, 10, 11, 12
§ 33(g)(1), 33 U.S.C. 933(g)(1) .....	2, 4, 5, 7, 8, 9
§ 33(g)(2), 33 U.S.C. 933(g)(2) .....	2
33 U.S.C. 921a .....	15
20 C.F.R.:	
Section 701.201 .....	15
Section 701.202(a) .....	15
Section 802.410(b) .....	15
Fed. R. App. P. 15(a) .....	14, 15, 16

## Miscellaneous:

2A Arthur Larson, <i>The Law of Workmen's Compensation</i> (1995) .....	17
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*ON PETITION FOR A WRIT OF CERTIORARI  
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**BRIEF FOR THE FEDERAL RESPONDENT**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-17) is reported at 65 F.3d 460. The decision and order of the Benefits Review Board (Pet. App. 20-55) are reported at 28 Ben. Rev. Bd. Serv. (MB) 137, and the decision and order of the administrative law judge (Pet. App. 56-88) are reported at 26 Ben. Rev. Bd. Serv. (MB) 174.

**JURISDICTION**

The judgment of the court of appeals was entered on October 3, 1995. A petition for rehearing was denied on November 22, 1995. Pet. App. 18-19. The petition

for a writ of certiorari was filed on January 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered employees for work-related injuries that result in disability, and also to the survivors of covered employees if the injury causes death. 33 U.S.C. 908, 909; see also 33 U.S.C. 907 (employer must provide medical services for covered injuries). A "person entitled to \* \* \* compensation" under the LHWCA may also recover from a third person who is liable in damages. 33 U.S.C. 933(a). If a person entitled to compensation obtains a third-party recovery, the employer receives a credit against its LHWCA liability to that person for the net amount recovered by that person against the third party. See 33 U.S.C. 933(f). If a "person entitled to compensation" wants to settle a third-party action, and if the settlement is to be for less than the amount of compensation to which the person would be entitled under the LHWCA, the employer remains liable for compensation under the LHWCA to that person only if prior written approval of the settlement is obtained from the employer. 33 U.S.C. 933(g)(1) and (2).<sup>1</sup>

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<sup>1</sup> Section 33(g) of the LHWCA, 33 U.S.C. 933(g), provides in relevant part:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person \* \* \* for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation \* \* \* only if

2. Respondent Maggie Yates is the widow of Jefferson Yates, a former employee of petitioner Ingalls Shipbuilding, Inc.<sup>2</sup> Mr. Yates was a pipefitter who was exposed to asbestos during his employment with petitioner. In April 1981, Mr. Yates filed a claim for disability benefits under Section 8 of the LHWCA, 33 U.S.C. 908. In 1982, petitioner admitted compensability of Mr. Yates' claim for disability benefits. In May 1983, petitioner and Mr. Yates entered into a settlement agreement pursuant to 33 U.S.C. 908(i) in which petitioner agreed to pay Mr. Yates a lump sum of \$15,000 and to provide him medical benefits and payment of his attorney's fees. Pet. App. 2.

Meanwhile, in May 1981, Mr. Yates had filed a lawsuit against third parties (23 manufacturers and sellers of asbestos) seeking damages for his injuries that arose out of his exposure to the defendants' asbestos products while he was employed by petitioner. Over time, Mr. Yates entered into partial settlements with several of the defendants in the third-party suit. Pet. App. 62-63. Respondent Maggie Yates was not a party to Mr. Yates' lawsuit for

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written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed \* \* \*.

(2) If no written approval of the settlement is obtained and filed \* \* \* all rights to compensation and medical benefits under this chapter shall be terminated \* \* \*.

<sup>2</sup> Petitioner American Mutual Liability Insurance Company was the workers' compensation carrier for petitioner Ingalls, but is now in receivership. Pet. 2 n.2. Petitioner Mississippi Insurance Guaranty Association has assumed its obligations for payments of benefits under the LHWCA. *Ibid.* All further references to "petitioner" are to petitioner Ingalls, unless otherwise specified.

damages but, as a condition of her husband's settlement with some of the defendants, she released her potential claims against various defendants, including in some instances her potential wrongful death claims. *Id.* at 3. Petitioner was not a party to the third-party lawsuit and did not provide its approval of the settlements. None of the settlements attempted to foreclose petitioner from bringing its own third-party action. *Id.* at 63.

Mr. Yates died in January 1986 from prostate cancer. The parties stipulated, however, that he had asbestosis that contributed to his death. Pet. App. 3. In April 1986, respondent Maggie Yates filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. 909. Mr. Yates' six adult children were not entitled to compensation under the LHWCA because they were not dependent on him and they did not file any LHWCA claims. Pet. App. 3; see 33 U.S.C. 909(b) (providing death benefits for surviving child or children); 33 U.S.C. 902(14) (non-dependent adult is not a "child").

Respondent Yates and her children pursued Mr. Yates' third-party lawsuit against the defendants who had not yet settled. The personal injury suit was converted at that point into a wrongful death action. Pet. App. 3. They entered into three settlements with third-party defendants totalling \$105,821.00 (\$63,680.67 net of attorney's fees and expenses). *Id.* at 3, 23. Unlike the pre-death settlements, respondent Yates, as a widow entitled to compensation under the LHWCA, obtained petitioner's prior written approval of those settlements in accord with Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1). Pet. App. 3, 23, 64.

3. Petitioner controverted respondent Yates' claim for death benefits and the case was referred to an administrative law judge (ALJ) for a hearing. Pet. App. 58. Petitioner admitted the compensability of respondent's claim, but contended that it was barred by Section 33(g)(1) of the LHWCA because petitioner's prior approval had not been obtained for the pre-death settlements with the third-party defendants. See *id.* at 64-65. The ALJ held that Section 33(g)(1) did not bar respondent Yates' claim, reasoning that respondent was not yet a "person entitled to compensation" for purposes of Section 33(g) when she joined the third-party settlements prior to Mr. Yates' death and therefore was not subject to the employer-approval requirement of Section 33(g). The ALJ ruled that potential widows are not "persons entitled to compensation" because, unlike an injured employee, the spouse of an injured employee has no cause of action for LHWCA benefits unless and until the injured employee dies, and only if the death is from a work-related injury. Pet. App. 68. The ALJ pointed out that, until her husband died, respondent Yates could not have known that his job-related disability would cause his death, or that she would survive him and still be his wife at the time of death. *Ibid.* The ALJ concluded that Congress's intent was clear in Section 9 of the LHWCA that a cause of action for death benefits does not arise until the death of the injured employee, and that respondent Yates could not have been deemed a "person entitled to compensation" until her husband died due to a work-related injury. Thus, the failure to obtain petitioner's prior approval of the pre-death settlements could not bar respondent's claim. Pet. App. 70-71.

The ALJ also addressed the amount of the offset to which petitioner was entitled under Section 33(f) of the LHWCA, 33 U.S.C. 933(f), as a result of the post-death settlements that it had approved. Petitioner claimed that it was entitled to a credit for the total amount of the net proceeds from the post-death settlements, including the amounts paid to Mr. Yates' six surviving children. Pet. App. 64, 82. Respondent Yates claimed, however, that, according to state law, her share of the net proceeds of the settlement constituted only one-seventh of the total (the other six-sevenths going to the children), and that only her share could be offset against petitioner's liability to her for death benefits. *Id.* at 64-65. The ALJ concluded that state law governed the question of the settlement apportionment and that Mississippi law provides for apportionment of the recovery between respondent and the six children. Thus, respondent was entitled to and received only one-seventh of the net settlements. *Id.* at 82-83. Nevertheless, the ALJ allowed petitioner to offset the entire amount of the net settlement proceeds under a different legal theory. Specifically, the ALJ agreed with petitioner's argument that the terms of the settlement agreements themselves should be construed to obligate respondent Yates to give petitioner credit for the entire amount, including the amount received by the children. *Id.* at 84-86.<sup>3</sup>

4. The Benefits Review Board affirmed in part and reversed in part. Pet. App. 20-55. Relying on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992),

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<sup>3</sup> The ALJ also approved an award of funeral expenses under Section 9(a) of the LHWCA and of attorney's fees to respondent's lawyer. Pet. App. 72-82, 87.

which was decided after the ALJ's decision, the Board affirmed the ALJ's ruling that Section 33(g)(1) did not bar respondent Yates' claim. The Board recognized that, in *Cowart*, this Court held that an injured employee is subject to Section 33(g)(1)'s written-approval requirement as a "person entitled to compensation" when his right to recover vests, not when his employer admits liability. Pet. App. 30-31, citing *Cowart*, 505 U.S. at 475-479. The Board noted, however, that the *Cowart* Court did not address the distinct issue of when a potential widow becomes a "person entitled to compensation" for purposes of Section 33(g)(1). Pet. App. 31. The Board emphasized the difference between employees' entitlement to disability benefits under the LHWCA and the right of surviving spouses of former employees to death benefits. *Id.* at 33-34. The Board agreed with the ALJ that the right of a potential widow to receive death benefits does not vest until her spouse dies as a result of a work-related injury. It noted that numerous events could intervene that would affect her rights, including the employee's death due to a non-work-related ailment, the widow's predeceasing the employee, divorce, or a change in the law. *Id.* at 35. Applying the rationale of the *Cowart* decision to respondent Yates, the Board concluded that, because respondent had no vested right to death benefits before her husband died, she became a "person entitled to compensation" only upon the death of her husband, and therefore was not subject to Section 33(g)(1)'s written-approval requirement when she signed the pre-death settlements. *Id.* at 31-37. The Board noted its disagreement with the contrary ruling of the Ninth Circuit in *Cretan v. Bethlehem*

*Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994).

The Board reversed the ALJ's finding that petitioner was entitled to credit the entire net proceeds of the post-death settlements entered into by respondent Yates and her six adult children against its liability for death benefits to Yates alone. The Board agreed with the ALJ that, under Section 33(f), petitioner was entitled to credit only the one-seventh share of the settlements apportioned to respondent, and not the shares that were apportioned to the adult children who were not persons entitled to compensation under the LHWCA. Pet. App. 42. The Board also held, however, contrary to the ALJ, that the settlements did not require respondent to give a greater credit, and further noted that Section 15(b) of the LHWCA, 33 U.S.C. 915(b), would in any event prohibit such a credit as a waiver of compensation rights under the LHWCA. Pet. App. 42-44.<sup>4</sup>

5. The court of appeals affirmed. Pet. App. 1-17. Like the Board, it read *Cowart* to hold that a "person entitled to compensation" means a person whose right to compensation has vested. The court then held that, under *Cowart*, respondent Yates was not a "person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. *Id.* at 10. Because her right to benefits had not vested when she entered into the pre-death settlements, respon-

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<sup>4</sup> Administrative Appeals Judge Brown filed a concurring opinion. Pet. App. 45-52. Administrative Appeals Judge Smith also filed a separate opinion, concurring in the affirmance of the Section 33(g)(1) ruling, but dissenting from the reversal of the ALJ's ruling permitting petitioner to offset the recovery received by the adult children. *Id.* at 52-55.

dent's failure to obtain petitioner's prior written approval of those settlements under Section 33(g) did not bar her subsequent claim to benefits. *Id.* at 10-11.

The court of appeals also affirmed the Board's ruling that petitioner could offset only one-seventh of the net post-death settlements, the amount respondent Yates received, against its LHWCA liability to Yates. Relying on the text of Section 33(f), the court agreed with the similar conclusion reached by other courts of appeals and rejected petitioner's argument that it was entitled to offset the entire amount of the settlements, including the recoveries by persons other than respondent. Pet. App. 12-13. Finally, the court affirmed the Board's holding that the post-death settlements did not call for a different result, reasoning that the settlements did not reflect with sufficient clarity an intent to grant petitioner a credit greater than what respondent Yates recovered. *Id.* at 13-16. In a footnote, the court also rejected petitioner's argument that the Director of the Office of Workers' Compensation Programs lacked standing to participate as a respondent. *Id.* at 6 n.2.

## DISCUSSION

Petitioner seeks this Court's review of four questions, three of which concern respondent Yates' claim for death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Petitioner is correct in asserting that there is disagreement between two courts of appeals regarding the first question presented: whether Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" to obtain an employer's prior written approval of certain settlements with a third party who

may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive. Therefore, although we believe the court of appeals correctly resolved that issue on the merits, we agree with petitioner that plenary review by this Court is warranted with regard to the first question presented. We believe that review of the other three questions is not warranted, however, for the reasons set forth below.

1. Petitioner is correct (Pet. 10) that the decision below conflicts with the Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), regarding whether an employee's relative, such as Yates, is a "person entitled to compensation" under Section 33(g) of the LHWCA prior to the death of the employee. The court of appeals in this case, correctly in our view, held that respondent Yates was not a "person entitled to compensation" under the LHWCA prior to her husband's death because her right to death benefits under the LHWCA did not vest until her husband died due to a work-related injury. It follows that her failure to obtain prior written approval from petitioner cannot bar her claim for death benefits under the LHWCA. In *Cretan*, by contrast, the Ninth Circuit held that a widow's claim for death benefits under the LHWCA was barred because, prior to her husband's death, she had entered into settlements with third parties without the consent of her husband's employer. 1 F.3d at 843.

The court of appeals' decision in this case is consistent with the Court's interpretation of the LHWCA set forth in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). There, the Court

explained that "the normal meaning of entitlement includes a right or benefit for which a person qualifies." *Id.* at 477. Prior to her husband's death, respondent Yates did not qualify for LHWCA death benefits. Her qualification for such benefits was contingent on a number of statutory prerequisites that had not yet occurred and were not certain to occur. Specifically, her husband had to die from a work-related injury or illness, 33 U.S.C. 909, and she had to survive him and qualify as an eligible "widow," 33 U.S.C. 902(16). Just as the claimant for disability benefits in *Cowart* "became a person entitled to compensation at the moment his right to recovery vested," 505 U.S. at 477, so respondent Yates became entitled to death benefits under the LHWCA only when her right to recovery vested, i.e., at the time of her husband's death due to a work-related illness.

The court of appeals correctly applied that "normal meaning" of "entitled" in this case. The central holding in *Cowart* is that entitlement within the meaning of 33 U.S.C. 933(g) attaches only when a right to recover LHWCA benefits vests. Pet. App. 10. Petitioner's focus (Pet. 11-13) on Section 33(g)'s policy of protecting employers from improvident third-party settlements entered into by "person[s] entitled to compensation" does not justify a departure from the normal meaning of the statutory text.

Although we agree with the court of appeals' ruling, we also agree with petitioner that review by this Court would be appropriate in light of the disagreement between the circuits.<sup>5</sup> In our brief in

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<sup>5</sup> Both the Fifth and Ninth Circuits have rejected suggestions for rehearing en banc. Pet. App. 18-19; Brief for the

opposition to the petition for a writ of certiorari in *Cretan*, we expressed our disagreement with the Ninth Circuit's ruling, but we urged denial of the petition because *Cretan* was the first appellate decision after *Cowart* to construe Section 33(g) and there was not yet any disagreement among the courts of appeals. The correct interpretation of Section 33(g) is an important and recurring issue, however. For example, petitioner has had more than 3,000 asbestos-related claims filed against it that petitioner asserts should be barred by Section 33(g). See *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 131 n.2 (5th Cir. 1994). Many of those claims are likely to involve settlements by individuals who had no vested right to compensation at the time of the settlement. Therefore, in light of the circuit conflict that has now arisen, review by this Court is warranted. Cf. *Cowart*, 505 U.S. at 475 (Court "granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision").

2. Petitioner contends (Pet. 15-17) that the Court also should grant review to determine whether the Director of the Office of Workers' Compensation Programs had standing to participate as a respondent in the court of appeals. Petitioner correctly notes that, in ruling that the Director had standing as a respondent (Pet. App. 6 n.2), the court of appeals rejected a line of cases in which the Fourth Circuit had held that the Director does not automatically have standing in the court of appeals as a party respondent. See Pet. 16, citing *I.T.O. Corp. of Baltimore v.*

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Federal Respondent in Opposition at App. 1a-3a, *Cretan v. Director, OWCP*, 114 S. Ct. 2705 (1994) (No. 93-1446).

*Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976), vacated and remanded, 433 U.S. 904, cert. denied, 433 U.S. 908 (1977). Petitioner (Pet. 17) and the court of appeals (Pet. App. 6 n.2) both point out that this Court left open the question of the Director's party-respondent status in its recent decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 115 S. Ct. 1278, 1284 & n.2 (1995).<sup>6</sup>

The presence of the claimant, respondent Yates, as a respondent in the court of appeals and in this Court makes it unnecessary for the Court to address the issue of the Director's status as a respondent in this case. See *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) (unnecessary to decide if Director is proper respondent where all issues on merits are presented by claimant and employer); cf. *United States Dep't of Labor v. Tripplett*, 494 U.S. 715, 719 (1990) (unnecessary to decide Department of Labor's standing as petitioner where other petitioner had standing); *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 305 (1983)

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<sup>6</sup> To petition for review, a person must be "adversely affected or aggrieved by a final order of the [Benefits Review] Board." 33 U.S.C. 921(c). In *Harcum*, the Court held that the Director did not have a right to petition under Section 921(c) when she relied "solely upon the mere existence and impairment of [the Director's] governmental interest" as administrator of the LHWCA. 115 S. Ct. at 1285. The LHWCA does not similarly limit who may be a respondent in the court of appeals, however, and this Court did not suggest that a "governmental interest" would be insufficient to confer respondent status. See *id.* at 1284 n.2 ("Obviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal").

(presence of claimant and employer as parties satisfies constitutional dimension of standing). Moreover, the fact that the Fourth Circuit has taken a different approach toward the Director's role as a respondent has had little practical effect on the Director's LHWCA enforcement. The Fourth Circuit routinely allows the Director to participate as an intervenor, thereby giving the Director the same party status that she has in the other courts of appeals. See, e.g., *Parker v. Director, OWCP*, 75 F.3d 929, 934-935 (4th Cir. 1996); *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996) (Director "has shown good cause to intervene" because she administers and enforces the LHWCA and the court defers to her interpretation); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 n.1 (4th Cir. 1995). Thus, no conflict has arisen, as a practical matter, regarding whether the Director may "actively respond" to a petition for judicial review.

In any event, we believe that the court of appeals correctly adhered to circuit precedent holding that the Director is properly a respondent under Rule 15(a) of the Federal Rules of Appellate Procedure, which expressly requires a petitioner seeking review of an agency order to name the agency as a respondent.<sup>7</sup> Pet. App. 6 n.2, citing *Ingalls Shipbuilding*

<sup>7</sup> Rule 15(a) provides in relevant part:

(a) **Petition for Review of Order; Joint Petition.** Review of an order of an administrative agency \* \* \* must be obtained by filing with the clerk of a court of appeals that is authorized to review such order \* \* \* a petition [which] \* \* \* must name each party seeking review [and] \* \* \* must designate the respondent and

*Div. v. White*, 681 F.2d 275, 281-284 (5th Cir. 1982), overruled on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); see also *Thornton v. Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984). Petitioner sought review of an order of the Department of Labor's Benefits Review Board under Section 21(c) of the LHWCA, 33 U.S.C. 921(c). Pursuant to his authority to appoint attorneys to represent him "in any court proceedings under section 921," 33 U.S.C. 921a, the Secretary has specified that the Director, as the Secretary's designee responsible for enforcing the LHWCA, is the proper party to appear on behalf of the Secretary in all such review proceedings. 20 C.F.R. 802.410(b); see also 20 C.F.R. 701.201, 701.202(a) (delegations of Secretary's authority); cf. *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.) (discussing adjudicative functions of Benefits Review Board, whose members are appointed by and subject to removal by the Secretary), cert. denied, 462 U.S. 1119 (1983). As the Secretary's representative, the Director's views are entitled to deference. See, e.g., *Cowart*, 505 U.S. at 476 (recognizing deference generally owed to Director rather than to Board); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793-795 (2d Cir. 1992); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990). Deference would mean little if the Direc-

the order or part thereof to be reviewed. \* \* \* In each case the agency must be named respondent. \* \* \* Fed. R. App. P. 15(a).

tor had no right to express her views on the underlying issues.<sup>8</sup>

3. Petitioner contends (Pet. 17-22) that, with regard to the three settlements entered into by respondent Yates (with petitioner's consent) after her husband's death, Section 33(f) of the LHWCA entitles it to offset against its LHWCA liability to respondent Yates not only the net amount she received, but also the net proceeds received by Mr. Yates' adult children in those settlements.

The plain language of Section 33(f) prohibits petitioners' requested offset. See Pet. App. 12-13. Section 33(f) provides that, when a "person entitled to compensation" institutes third-party proceedings, the employer must pay compensation "equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person." 33 U.S.C. 933(f). The "net amount" is "the actual amount recovered less the expenses reasonably incurred *by such person* in respect to such proceedings." *Ibid.* (emphasis added). Thus, the only "net amount" that reduces an employer's LHWCA liability

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<sup>8</sup> Several other courts of appeals have held that the Director is properly a respondent to a petition for review of a Board decision. See *Goldsmit v. Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 481-485 (D.C. Cir. 1982); see also *Simpson v. Director, OWCP*, 681 F.2d 81, 82 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983); *Insurance Co. of North America v. Gee*, 702 F.2d 411, 413 n.2 (2d Cir. 1983); *Curtis*, 849 F.2d at 807 n.4 (noting strength of *Shahady* rationale, but reserving question). Some of the decisions recognizing the Director's status as a respondent are based on 33 U.S.C. 921(c) and some are based solely on Federal Rule of Appellate Procedure 15(a).

is the net amount received by a "person entitled to compensation."

The court of appeals' decision is consistent with the views of the other courts of appeals that have addressed the issue. See Pet. App. 12-13; *I.T.O. Corp. v. Sellman*, 967 F.2d 971, 972-973 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991) ("The Director's position is a reasonable interpretation of the statutory language"); see also *Hill v. Arrien*, 336 F. Supp. 799, 803 (E.D. Pa. 1972), aff'd mem., 474 F.2d 1339 (Table), vacated in part, 475 F.2d 1395 (3d Cir. 1973) (Table); *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 808 (E.D. Va. 1960); 2A Arthur Larson, *The Law of Workmen's Compensation* § 74.31(f) (1995). Further review of the issue is not warranted.

4. Petitioner contends (Pet. 22-24) that the terms of the particular settlement agreements entered into by respondent Yates constitute another basis for awarding petitioner an offset against its liability to respondent in an amount equal to the total recovered by respondent and Mr. Yates' adult children. That fact-bound issue does not merit review by this Court. The court of appeals reasonably interpreted the settlements as reflecting an intent to give a credit only to the extent that any compensation payments constitute a lien against a third-party recovery. Pet. App. 14. The settlement language purporting to give a credit against settlement sums subject to a compensation lien reflects an intent to limit the credit "to the portion of the settlement paid to a party entitled to compensation." *Id.* at 15. Only respondent Yates

was a person entitled to compensation; Mr. Yates' children were not entitled to such statutory benefits.<sup>9</sup>

#### CONCLUSION

The petition for a writ of certiorari should be granted limited to question one. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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<sup>9</sup> Contrary to petitioner's argument (Pet. 22-24), the court of appeals properly rejected the ALJ's contrary construction of the settlements. The ALJ recognized that some settlement language did not support his construction, Pet. App. 85-86, opined that the settlements as he construed them may be deemed "unconscionable and void as between employer and claimant," and reached his construction based largely on a misinterpretation of a prior court of appeals decision. See *id.* at 86, citing *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.), cert. denied, 484 U.S. 976 (1987). Moreover, as the Director argued below, the ALJ reached a result at odds with Sections 15(b) and 16 of the LHWCA, which prohibit waivers of rights to compensation. See 33 U.S.C. 915(b), 916.